90-531

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MC EVOY TRAVEL BUREAU, INC.

V.

HERITAGE TRAVEL, INC.
DONALD R. SOHN
AND
NORTON COMPANY

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 89-1999

MC EVOY TRAVEL BUREAU, INC.,
Plaintiff, Appellant,

V.

HERITAGE TRAVEL, INC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, U.S. District Judge]

Before
Campbell, Chief Judge
Bownes, Senior Circuit Judge
and Cyr, Circuit Judge.

Daniel F. Featherston, Jr., with whom Christopher L.Maclachlan was on brief for appellant.

Louis M. Ciavarra with whom Michael P. Angelini, Vincent F. O'Rourke, Jr., and Bowditch & Dewey were on brief for appellee Norton Company.

Marcus E. Cohn, P.C., with whom J. William Codinha, P.C., Fred A. Kelly, Jr., and Peabody & Brown were on brief for appellees Heritage Travel, Inc. and Donald R. Sohn.

June 1, 1990

LEVIN H. CAMPBELL, Chief Judge.

McEvoy Travel Bureau, Inc. brought a four count complaint under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C., §§ 1961-1968, against Heritage Travel, Inc., the President of Heritage, and Norton Company. The district court, 721 F.Supp. 15, granted the defendants' motion to dismiss for failure to state a claim. McEvoy appeals. We conclude that McEvoy's complaint fails to allege any predicate acts of racketeering activity. We, therefore, affirm.

I.

Since this appeal is from a dismissal for failure to state a claim, we narrate the facts of the complaint in a light most favorable to the plaintiff-appellant, McEvoy Travel Bureau, Inc. ("McEvoy"). *See, e.g., Chongris v. Andover Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 765 (1987). In 1980, McEvoy and defendant-appellee, Norton Company ("Norton") entered into a long-term oral contract under which McEvoy was to be the exclusive agent for all of Norton's travel business in the Worcester, Massachusetts, area. McEvoy was a small travel

agency operating in Worcester. Norton is a large corporation headquartered in Worcester. Under the Norton-McEvoy contract, Norton was entitled to rebates representing a share in McEvoy's commissions generated by car rentals, hotel reservations and convention business. At the time the contract was entered into, according to the complaint, travel agencies such as McEvoy were prohibited by federal regulations from giving rebates from air fare commissions to their corporate customers. However, beginning in 1983, regulations were modified to permit air fare commission rebates on domestic air travel, but not on international travel. At this time, McEvoy began permitting Norton to share in domestic air fare commissions. By 1983, the Norton account represented about two thirds of McEvoy's total commission income.

In March 1983, Norton made requests to several travel agencies, including McEvoy, to submit bids to serve as Norton's exclusive agent. McEvoy viewed this as a breach of its contract to serve as Norton's exclusive agent. McEvoy, therefore, refused to take part in the bidding and informed Norton of the reasons for its refusal. On May 5, 1983, the exclusive contract was awarded to defendant-appellee, Heritage

Travel, Inc. ("Heritage"). Shortly thereafter, on May 16, 1983, Norton terminated McEvoy's services, effective July 31, 1983. After the loss of the Norton account, McEvoy's profits rapidly decreased until October 1985, when all McEvoy's assets were sold for $140,000.

In October 1983, McEvoy brought suit against Norton in the Massachusetts Superior Court, alleging breach of contract, deceit, and unfair or deceptive acts or practices under Massachusetts G.L. ch. 93A. The jury found for McEvoy on both the deceit and contract counts and awarded damages of $465,000. The Superior Court ruled, however, that McEvoy's arrangement with Norton in 1980 was not an enforceable contract because of the statute of frauds. The court accordingly entered judgment notwithstanding the verdict for Norton on the contract count. On the deceit count, the court denied Norton's motion for judgment notwithstanding the verdict, but ordered a new trial on that count unless McEvoy would accept a remittitur of $165,000. McEvoy accepted the remittitur, reducing its damages to $3000,000. The court then ruled that Norton was liable for a knowing or willful deceptive practice under Mass.G.L. ch. 93A and, therefore, doubled the damage award

to $600,000 and entered judgment for McEvoy on the deceit and the deceptive practices claims. Appeals by both Norton and McEvoy are now pending in the state court.

II.

On December 2. 1988, McEvoy brought this action in the United States District Court for the District of Massachusetts against Norton, Heritage, and the President of Heritage, Donald Sohn (collectively referred to as "appellees"). The complaint alleges four counts under the Racketeer Influenced and Corrupt Organizations Act ("RICO")--two against Norton under 18 U.S.C. §1962(a) and (c); one against Heritage under 18 U.S.C. §1962(a), and one against Sohn under 18 U.S.C. §1962.Alleging that it was injured, "by reason of" the alleged RICO violations, McEvoy seeks treble damages and attorney's fees pursuant to 18 U.S.C. §1964(c).[1]

(1) Establishing a RICO violation under either section 1962(a) or section 1962(c) requires proof of a "pattern of racketeering activity" or of "collection of unlawful debt." *See*

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[1]Section 1964(c) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. §1962; *H.J. Inc* v. *Northwestern Bell Telephone Co.*,___U.S.___, 109 S.Ct. 2893, 2897, 106 L.Ed. 2d (1989).[2] McEvoy's claims rely only on the contention that the appellees engaged in a pattern of racketeering activity; there are no allegations of the collection of an unlawful debt. To establish a pattern of racketeering, a plaintiff must show at least two predicate acts of "racketeering activity", as the statute defines such activity, and must establish that the "predicates are related *and* that they amount to or pose a threat of continued criminal activity." *Id.* 109 S.Ct. at 2900. Racketeering activity is defined in 18 U.S.C.§1961(1) as constituting certain specified state or federal crimes. These include mail fraud in violation of

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[2]Section 1962(c) provides, in part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal..., to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect , interstate commerce.

Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1341 and wire fraud in violation of 18 U.S.C. §1343. *See* 18 U.S.C. §1961(1).

The basis of McEvoy's RICO claims is McEvoy's contention that the appellees fraudulently ousted McEvoy as Norton's exclusive agent by means of a pattern of racketeering activity consisting of numerous acts of mail and wire fraud. According to the complaint, the fraudulent scheme consisted of three elements.

The first element involved the execution and performance of an allegedly illegal contract between Norton and Heritage that took effect in September 1983. McEvoy alleges that the only reason Norton terminated its exclusive contract was that Heritage was able to provide services at a lower cost. The complaint further alleges that Heritage was able to provide Norton with services at a lower cost solely because of an illegal contract under which Heritage rebated to Norton commissions from international travel air fares and made certain rent payments to Norton, both of which McEvoy contends violated Federal Aviation laws, 49 U.S.C.App. §1373(b)(1) and 49 U.S.C.App.

§1472(d)(1) and (2), and corresponding federal regulations promulgated by the Civil Aeronautics Board.[3]

As the second element of the alleged scheme, McEvoy alleges that to commence business under the illegal contract, Norton and Heritage were required to obtain approval from the air industry's two self-regulatory associations, the Air Traffic Conference ("ATC") and the International Air Transport Association ("IATA"). *See Costantini v. Trans World Airlines*, 681 F.2d 1199, 12000 (9th Cir.) (approvals from ATC and

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[3]Section 1373(b)(1) provides, in part,

No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier; and no carrier or foreign air carrier or ticket agent shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the [Civil Aeronautics] Board to be specified in such tariffs except those specified therein...

49 U.S.C.App. §1373(b)(1).

Section 1472(d)(1) makes it a misdemeanor for an agent to knowingly and willfully give "any rebate or other concession in violation of the provisions of this chapter." Section 1472(d)(2) subjects to fines any person who knowingly and willfully "receives a refund or remittance of any portion of the rates, fares, or charges lawfully in effect for the air transportation of property..., with respect to matters required by the Board to be specified in currently effective tariffs applicable to the air transportation of property...."

In light of our holdings below, *see* part III, we express no view on whether any of the payments alleged here would violate these provisions.

IATA "are a prerequisite for a branch office to issue interstate and international airline tickets"), *cert. denied*. 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed. 2d 932 (1982). In order to secure this necessary approval, on June 16, 1983, the appellees allegedly submitted a fraudulent contract to the two regulatory associations. The submitted contract did not reveal the illegal rent payments and rebates on international air commissions, and specifically stated that Heritage would not in any way grant rebates to Norton. The actual Norton-Heritage contract, however, allegedly provided that Heritage would make the illegal rebates and rent payments. Although the actual contract was dated October 1983, by its terms, it was to take effect on September 1, 1983.

As the third element of the alleged fraudulent scheme, McEvoy alleges that Sohn and Heritage engaged in a "kickback" scheme with American Airlines, under which Sohn and Heritage allegedly received payments from American Airlines in violation of 49 U.S.C.App. §§1373 and 1472.[4] These payments are alleged to be part of the appellees' scheme to defraud McEvoy,

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[4]See note 3, above.

because they were necessary to make the Norton-Heritage arrangement "financially viable for Heritage."

McEvoy alleges that in the course of securing ATC-IATA approval of the Norton-Heritage contract and carrying out the various alleged illegal payments, the appellees committed numerous acts of racketeering activity. The pattern of racketeering activity allegedly consists of the numerous uses of the mails and interstate wires that were necessary to carry out the three-part fraudulent scheme, i.e., the usages of the mails and wire necessary to secure ATC-IATA approval of the Norton-Heritage contract;[5] the mail and wire usages necessary to perform the Norton-Heritage contract (including the "thousands" of mailings and telephone calls necessary to arrange Norton's international travel arrangements from which Norton received the illegal rebates); and the usages of the mails in connection

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5 McEvoy suggests in its appellate brief that in addition to the mailings involved in obtaining the initial ATC-IATA approval of the Norton-Heritage arrangement, subsequent uses of the mails may have been required to *maintain* ATC-IATA approval. McEvoy briefly made a similar argument in its supplemental memorandum of law filed in the district court. However, McEvoy's complaint contains no allegations indicating that supplemental filings with the ATC and IATA were made or even were required. We need not decide whether this deficiency in the complaint precludes consideration of any subsequent mailings to the ATC and IATA, because even assuming that there were such mailings, this would not affect our analysis below.

with the alleged illegal "kickback" deal that Sohn made on behalf of Heritage with American Airlines.

All three defendants moved in the district court for dismissal on several grounds: failure to state a claim, statute of limitations, and res judicata. The district court granted the motions, ruling that the complaint failed to state a claim for which relief could be granted.

III.

McEvoy argues that the district court erred in dismissing its RICO claims. The appellees respond by arguing that the district court's dismissal may be affirmed on any of several grounds. The parties have thus raised numerous issues, including whether the Norton-Heritage contract is illegal; whether appellees' alleged conduct constitutes mail and wire fraud violations; whether the alleged conduct amounts to a pattern of racketeering activity; whether McEvoy's injury was caused by the alleged RICO violations; whether McEvoy's claims are barred by res judicata; and whether the claims are barred by the statute of limitations. For the reasons explained below, we conclude that as a matter of law the allegations fail to show that the appellees engaged in a scheme to defraud anyone

of property or money within the meaning of the mail and wire fraud statute. Consequently, McEvoy's mail and wire fraud allegations and the derivative RICO claims are without merit. We, therefore, affirm without reaching these other issues.

A. *The Mail and Wire Fraud Statutes*

[2] To establish that the appellees violated the mail and/or wire fraud statutes McEvoy must show that the appellees engaged in a scheme to defraud with the specific intent to defraud and that they used the United States mails and/or the interstate wires in furtherance of the scheme. *See, e.g. Schreiber Distributing* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *United States* v. *Brien*, 617 F.2d 299, 307 (1st Cir.) *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980).[6] In *McNally* v. *United States*, 483

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[6]The mail fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises..., for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail...any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both....

18 U.S.C.§1341.

The wire fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be

U.S. 350, 107 S.Ct. 2875, 97 L.Ed 2d 292 (1987), the Supreme Court held that to come within the compass of the mail fraud statute, the scheme to defraud must be intended to deprive another of money or property. *See also Carpenter* v. *United States*, 484 U.S. 19, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (applying *McNally* to the wire fraud statute). Although *McNally* has been overridden by the enactment of 18 U.S.C. §1346, *McNally* is applicable here, because the alleged conduct all occurred prior to the enactment of section 1346.[7] *See United States* v. *Bush*, 888 F.2d 1145, 1145-46 (7th Cir. 1989) ("The new §1346 could not be applied retroactively, given the Ex Post Facto Clause of the Constitution"); *United States* v. *Stewart*, 872 F.2d 957, 960 n. 2 (10th Cir. 1989) (section 1346 does not apply to conduct occurring prior to November 18, 1988); *United States* v. *Davis*, 873 F.2d 900, 902 (6th Cir.) (section 1346 has no retroactive application), *cert. denied*___U.S.___, 110 S.Ct.

(Footnote 6 continued)
transmitted by means of wire, radio, or television communication in interstate commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined....
18 U.S.C. §1343.

7 Section 1346 provides, "For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

292, 107 L.Ed.2d 271 (1989); *Corcoran* v. *American Plan Corp.*, 886 F.2d 16, 19 n. 4 (2d Cir. 1989) (section 1346 held inapplicable to a RICO action alleging mail fraud which occurred before the enactment of section 1346). *Contra United States* v. *Berg*, 710 F.Supp. 438 (E.D.N.Y. 1989) (holding that section 1346 applied retroactively to conduct occurring prior to the date of the *McNally* decision). [8]

B. *The Fraudulent Scheme*

McEvoy claims that the appellees engaged in a fraudulent scheme to defraud McEvoy of its interest in Norton's travel business and that all of the alleged illegal acts of the appellees that were necessary to enable Heritage to effectively take over as Norton's travel agent were part of this alleged scheme. As is elaborated above, McEvoy alleges that the scheme consisted of three elements: (1) carrying out the provisions of the actual Norton-Heritage contract, including making the allegedly illegal payments; (2) securing ATC-IATA approval of the Norton-Heritage contract by submitting a phoney contract; and (3)

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[8] Because the relevant language of the mail and wire fraud statutes is the same, we apply the same analysis to the allegations under both statutes. *See Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 320 n. 6, 98 L.Ed.2d 275 (1987).

arranging and maintaining an allegedly illegal kickback scheme between Heritage and American Airlines in order to make the Norton-Heritage scheme financially viable for Heritage.

[3-5] McEvoy's contention that all the elements of the Norton-Heritage arrangement, as well as the ancillary Heritage-American Airlines agreement, could be characterized as a scheme to defraud within the meaning of the mail and wire fraud statutes is unpersuasive. We recognize that the scope of fraud under these statutes is broader than common law fraud, and that no misrepresentation of fact is required in order to establish a scheme to defraud. *See Atlas Pile Driving Co.* v. *DiCon Financial Co.*, 886 F.2d 986, 991 (8th Cir. 1989). However, not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud. *See, e.g., Fasulo* v. *United States*, 272 U.S. 620, 47 S.Ct. 200, 71 L.Ed. 443 (1926) (use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm is not a scheme to defraud under the mail fraud statute). Nor does a breach of contract in itself constitute a scheme to defraud. *See, e.g., United States* v. *Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980) ("[T]he [mail fraud] statute does

not reject all business practices that do not fulfill expectations, nor does it taint every breach of a business contract.") *Cf. United States* v. *Greenleaf*, 692 F.2d 182, 188 (1st Cir. 1982) ("breach of a fiduciary duty, *standing alone*, does not constitute mail fraud") (emphasis added), *cert. denied*. 460 U.S. 1069, 103 S.Ct. 1522, 75 L.Ed..2d 946 (1983). Rather, the scheme must be intended to *deceive* another by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct. *See, e.g., United States* v. *Brien*, 167 F.2d 299, 307 (1st Cir. 1980) ("The essence of a scheme is a plan to deceive persons...."); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.) (fraudulent scheme must be a scheme "calculated to deceive persons of ordinary prudence"), *cert. denied*, 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed.2d 1122 (1980); *Kreimer*, 609 F.2d at 128 ("'scheme or artifice to defraud' implicates only plans calculated to deceive"). *Cf. Carpenter* v. *United States*, 108 S.Ct. at 322 (employee's misappropriation of employer's confidential information was scheme to defraud where employee "continued in the employ of the Journal, appropriating its confidential business information for his own use, *all the while pretending to perform his duty of*

safeguarding it") (emphasis added). See also Websters Third International Dictionary (defraud means "to take or withhold from (one) some possession, right or interest *by calculated misstatement or perversion of truth, trickery, or other deception*") (emphasis added).

[6] We do not see how the alleged illegal kickbacks, rebates, and rent payments--elements one and three of the alleged scheme--could themselves be construed as a scheme to deceive McEvoy, or anyone else, by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct. While for the present purposes we accept as true McEvoy's allegations that the appellees engaged in an illegal rebate and kickback scheme, this conduct did not amount to a scheme to defraud.[9] There are no allegations that the alleged illegal payments were somehow used to induce McEvoy to give up its position as Norton's exclusive agent. The alleged illegal

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[9] McEvoy's use of the terms "kickbacks" might be read to suggest that the alleged payments from American Airlines to Heritage involved fraudulent activity independent of McEvoy's loss of the Norton business. McEvoy does allege that these payments were intended "to defraud" competing air carriers by "locking in Heritage's business." However, there are no allegations indicating that these payments involved *deceiving* anyone. Rather, McEvoy's theory is simply that the payments constitute a fraudulent scheme by Heritage because they violated 49 U.S.C.App. § 1373 and because they were necessary to make the Norton-Heritage arrangement "financially viable for Heritage."

payments all occurred *after* Norton had already terminated McEvoy's contract. And there are no allegations that the illegal payments themselves were intended to or had the effect of misleading or otherwise deceiving McEvoy or anyone else. We, therefore, conclude that the first and third elements were not schemes to defraud within the meaning of the mail and wire fraud statutes. McEvoy's mail and wire fraud allegations must succeed, if at all, on the basis of the second element of the alleged fraudulent scheme--the submission of the phoney contract to obtain approval from the ATC and IATA.[10]

C. *Deprivation of A Property Interest*

Regarding the second element, appellees argue that McEvoy's mail and wire fraud allegations fail as a matter of law

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10 Since we hold below that the scheme to fraudulently obtain ATC-IATA approval of the Norton-Heritage arrangement was not a scheme to defraud anyone of money or property, the mailings and wirings alleged in connection with the alleged illegal payments would not constitute mail and wire fraud under *McNally*, even if they could be construed as being in furtherance of that scheme. We note, moreover, that the mere fact that these mailings and wirings occurred as a result of the scheme to fraudulently obtain ATC-IATA approval does no mean they could be construed as being in furtherance of that scheme. *See, e.g. United States v. Maze*, 414 U.S. 395, 405, 94 S.Ct. 645, 651, 38 L.Ed.2d 603 (1973) ("Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this....") (footnote omitted); *United States v. Tackett*, 646 F.2d 1240, 1244 (8th Cir. 1981) ("The statute does not reach all mailings resulting from a fraudulent scheme, but only those which are in furtherance of the scheme.")

for lack of any victim who was defrauded of property. Appellees contend that the objects of the alleged fraud--the ATC and the IATA--were not deprived of any property interest, but at most were deprived of their intangible interest, as regulators, in being able to regulate the airline industry property. *See Corcoran* v. *American Plan Corp.*, 886 F.2d 16, 20-21 (2d Cir. 1989) ("mail fraud statute protects only the government's interest as a property-holder, including protection of a governmental entity in its capacity as regulator"); *McNally* v. *United States*, 483 U.S. 350, 356-59 & n. 8, 107 S.Ct. 2875, 2881 & n. 8, 97 L.Ed.2d 292 (1987) (the mail fraud statute does not protect the "intangible right of the citizenry to good government"; "any benefit which the Government derives from the statute must be limited to the Government's interests as property holder.").

[7, 8] We agree that neither ATC nor the IATA were defrauded for purposes of the federal mail and wire fraud statutes as they were then in effect. McEvoy, indeed, does not argue to the contrary. Rather McEvoy would have us find the requisite property loss (from the mailing of the phoney contract to the two regulators) in McEvoy's loss of the Norton travel

account. McEvoy contends that the mailings of the fraudulent contract "to and from Norton and Heritage and to the ATC and IATA were a necessary part of the overall scheme to capture [and deprive McEvoy of] the Norton travel business...."[11]

We do not believe, however, that the deceptive submission of the phoney contract to the two associations, so that Heritage would be allowed to serve as Norton's agent, was a scheme to defraud McEvoy within the meaning of the mail and wire fraud statutes. To be sure, the object of the submission may have been to "deceive the regulatory associations into

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11 It has already been determined in McEvoy's prior state court action that any contractual right that McEvoy might have had to Norton's travel services was unenforceable under the statute of frauds. The issue of Norton's contractual liability was fully litigated in that action and the Massachusetts Superior Court's determination was essential to its judgment on the contract claim. Consequently, under the doctrine of collateral estoppel, the determination that McEvoy lacked an enforceable contract right to Norton's travel business is binding here. *See Fireside Motors v. Nissan Motor Corp.*, 479 N.E.2d 1386, 1390, 395 Mass. 366 (1985). Since McEvoy lacked an enforceable contractual right to Norton's travel business, it could be argued that it has not been deprived of a money or property interest within the meaning of *McNally*. *Compare Roitman v. New York City Transit Authority*, 704 F.Supp. 346, 348 (E.D.N.Y. 1989) (inability to obtain employment was not a deprivation of a property interest for purposes of mail and wire fraud statutes) and *United States v. Slay*, 717 F.Supp. 689, 693 (E.D.Mo. 1989) ("mere contemplation of an ongoing contractual relationship" does not rise to a property right protected by the mail and wire fraud statutes) with *Lombardo v. United States*, 685 F.2d 155, 159-160 (7th Cir.) (defendants' fraudulent manipulation of sale of pension fund property caused deprivation of property interest where fund was deprived of "highest price for the...property"), *cert. denied*, ___U.S.___, 109 S.Ct. 3186, 105 L.Ed.2d 695 (1989). However, in view of our holding, we do not reach this question.

approving" the Norton-Heritage contract. This may have been part of a general plan having as its object the transfer of Norton's business to Heritage, leaving McEvoy bereft of its major client. But securing the regulatory associations' approval by devious means (thus permitting Heritage to serve Norton) did not mislead, trick or deceive McEvoy so as to defraud it. What appellees did to McEvoy was not to deceive it but to break off what McEvoy claims was a binding contract. The lack of a direct relationship between the regulatory fraud and McEvoy's injury is underscored by the fact that McEvoy was notified on May 16, 1983 that its arrangement with Norton was to end, while the phoney contract was not submitted to the ATC and IATA until June 16, 1983, at the earliest. There was, therefore, no causal connection, in the ordinary sense, between the fraudulent submission to the ATC and the IATA and McEvoy's injury. The latter was caused by Norton's withholding of its

business from McEvoy, not some trick or artifice.[12] The alleged submission of the fraudulent contract was not intended to bring about the termination of McEvoy's contract; rather, the submission was intended to persuade the ATC and IATA to approve the Norton-Heritage contract.

In asking that we regard the alleged scheme to fraudulently obtain ATC-IATA approval of the Norton-Heritage arrangement as a "but for" cause of McEvoy's injury, McEvoy argues, as its complaint also alleges, that Norton's reason for terminating McEvoy's services was that Heritage would be able to provide services at a lower net cost to Norton, and that Heritage would not have been able to do so without obtaining ATC-IATA approval of the contract.

But this puts the cart before the horse. We do no believe the deceptive scheme to obtain ATC-IATA approval can

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12 McEvoy argues that its injury did not occur all at once when Norton terminated the contract on May 16, 1983, or even when the termination took effect on July 31, 1983. Rather, McEvoy argues, its loss of annual commission from Norton represents an "on-going injury [which] approximately coincided with the first two years" of the Norton-Heritage arrangement. However, whether the injury is characterized as on-going or as occurring all at once at the time Norton gave notice that it was terminating McEvoy's contract, Norton's termination notice was the necessary and sufficient cause of the injury. Events occurring subsequent to that termination could not be the but-for cause of the termination, and *a fortiori* could no be the but-for cause of the injury which resulted from the termination.

somehow be transformed into a scheme to deceive McEvoy where the effective reach of the deception stopped at the two regulatory associations. While deceiving them may have been part of a larger plan having an adverse impact upon McEvoy, this fact did not make McEvoy the object of an act of mail and wire fraud. And, as we have indicated, the only parties deceived--the ATC and IATA--were not deprived of money or property. Under these circumstances, the appellees' alleged deceptive conduct was not a "scheme to defraud" anyone of money or property. *See United States* v. *Evans*, 844 F.2d 36, 39 (2d Cir. 1988) ("If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property.").[13]

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13 McEvoy cites no authority suggesting that McNally can be satisfied by establishing the existence of a scheme to deceive one party, thereby depriving another of property. McEvoy relies on *Schmuck* v. *United States*, ___U.S.___, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989). However, *Schmuck* addressed only the question of the requisite relationship between the mailings and the fraudulent scheme; it did not address the issue here of what relationship the deceptive conduct must have to the property deprivation to satisfy the dictates of *McNally*. *See Corcoran* v. *American Plan Corp.*, 886 F.2d 16, 20 n. 5 (2d Cir. 1989) ("The Court [in *Schmuck*] did not address the question of whether the same party must be both deceived and injured to state a violation of section 1341"). The other cases relied on by McEvoy do not address this issue and, for the most part, these cases predate *McNally*.

[9] Since McEvoy's complaint does not sufficiently allege a scheme to defraud anyone of money or property within the meaning of the mail and wire fraud statutes, the complaint fails to allege even a single predicate act of racketeering activity, and *a fortiori* fails to allege a pattern of racketeering activity as is required under RICO.[14]

The judgment of the district court is, therefore, AFFIRMED. Costs to appellees.

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14 To be sure, McEvoy has alleged a pattern of *unlawful* activity, insofar as it has alleged that the appellees were engaged in a long-term contract involving illegal payments in violation of 49 U.S.C.App. §§ 1373(b) and 1472(d). However, violations of those statutory provisions are not predicate acts of racketeering activity. See 18 U.S.C. § 1961(1). The mere fact that the Norton-Heritage operation, which as is explained above does not constitute a scheme to defraud, is allegedly illegal does not render it a pattern of racketeering activity. *Cf. Fleet Credit Corp.* v. *Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity' under the definition found within the RICO statute.").

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

No. 89-1999

MC EVOY TRAVEL BUREAU, INC.
Plaintiff, Appellant.

V.

HERITAGE TRAVEL, INC., ET AL.,
Defendants, Appellees.

Before

Breyer, Chief Judge,
Campbell, Circuit Judge,
Bownes, Senior Circuit Judge,
Torruella, Selya, Cyr and Souter,

ORDER OF COURT.

Entered: June 28, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Francis P. Scigliano
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

McEVOY TRAVEL BUREAU, INC.
Plaintiff

v.

CIVIL ACTION
NO. 88-2645-S

HERITAGE TRAVEL, INC.
DONALD R. SOHN and
NORTON COMPANY
Defendants

MEMORANDUM AND ORDER OF THE COURT
ON DEFENDANTS' MOTION TO DISMISS

September 25, 1989

SKINNER, D.J.

This complaint arises out of the termination of a 1980 exclusive contract for McEvoy Travel Bureau, Inc.("McEvoy") to provide all the travel arrangements for employees of defendant Norton Company ("Norton"). In March, 1983, Norton reopened bidding on the exclusive contract and replaced McEvoy with a competitor, Heritage Travel, Inc. ("Heritage"). McEvoy, now in bankruptcy, commenced an action in October, 1983 in Massachusetts Superior Court against Norton for wrongful termination of the contract claiming damages for breach of contract, deceit, and violation of M.G.L. c. 93A. The trial judge

set aside a verdict for McEvoy for breach of contract but let stand a finding of deceit on condition that the verdict be reduced to $300,000. The trial judge then ruled that the defendant had violated M.G.L. c. 93A and doubled the damages. The resulting judgment for $600,000 is currently on appeal in the state court.

The plaintiff filed this action on December 2, 1988 under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1964, alleging that the president of Heritage, Donald R. Sohn ("Sohn"), Heritage and Norton engaged in a pattern of racketeering activity, consisting of (1) the payment of allegedly illegal rebates on international air fare commissions to Norton; (2) the submission of an allegedly fraudulent contract to a regulatory association; and (3) the payment to Sohn of a $350,000 per year "kickback" from American Airlines. Defendants move to dismiss the complaint on the basis of collateral estoppel, res judicata, the applicable statute of limitations, and failure to state an actionable RICO claim.

Allegations of the Complaint.

The plaintiff alleges that the agreement between Norton and Heritage provided for the payment by Heritage of the salaries of certain Norton employees who were to work in Heritage's "in-plant" offices and also under certain circumstances for the payment of rent to Norton for the space occupied by the "in-plant" offices. The purported consultant fee of $350,000 paid to Sohn is alleged to be a kick-back to Sohn to induce him to cause Heritage to use American Airlines' computerized ticketing service for all of its airplane ticketing, including flights on other airlines. Plaintiff further alleges that Heritage was obliged to file a copy of its agreement with Norton with the Air Traffic Conference ("ARC") and the International Air Transport Association ("IATAN"), trade associations whose approval was necessary before the contract could become effective. According to the plaintiff, Heritage fraudulently filed a phoney agreement which did not reveal the provision for the payment of salaries or rent, and never filed the actual agreements. All of these matters were accomplished through use of the mails and computerized data used for airline reservations and ticketing was transmitted over interstate telephone lines.

Plaintiff asserts that the contract provisions constitute a rebate prohibited by 49 U.S.C. §§1372, 1471 and 1472. Use of postal and wire services in connection with the fraudulent filing of the phoney contract is said to constitute a violation of 18 U.S.C. §§1341 and 1343. These violations, presumably in combination with Norton's common law deceit and violation of M.G.L. c. 93A, supposedly constitute a "pattern of racketeering activity" through which the defendants conducted the affairs of an "enterprise", to wit, Heritage.

Rulings of Law.

18 U.S.C. §1962(c) prohibits "any person" from conducting the affairs of an "enterprise" "through a pattern of racketeering activity." A "'pattern of racketeering activity' requires at least two acts of racketeering activity," 18 U.S.C. §1961(5), but a single transaction is not converted into a pattern because it may involve multiple communications. Continuity and the threat of continuing activity is also a necessary element in the establishment of a pattern. *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987). Neither an individual nor a corporation may be both a "person" and an "enterprise" at the same time. *Id.*, p. 28. Neither violations of 49 U.S.C. §§1373,

1471 and 1472, nor common law deceit nor violation of M.G.L. c. 93A are included in the definition of racketeering activity contained in 18 U.S.C. §1961(1). The only wrongs alleged by the plaintiff which are included in that definition are violations of 18 U.S.C. §§1341 and 1343, mail fraud and wire fraud. There must be a causal connection between the predicate acts pleaded and the injury claimed by the plaintiff. *Pujol v. Shearson/American Exp., Inc.*, 829 F.2d 1201, 1206 (1st Cir. 1987); *Roeder, supra.*.

Accordingly, on the basis of the foregoing, I conclude that the plaintiff has not set out a claim upon which relief can be granted under RICO, for the following reasons:

1. Even if the conduct of the defendants was in violation of 49 U.S.C. §1373, which is extremely doubtful, such violation would not constitute a predicate act under 18 U.S.C. §1961.

2. The only alleged predicate acts are mail fraud and wire fraud, but they are alleged only in connection with a single transaction, the securing of a contract with Norton, and no pattern is apparent from the allegations of the complaint.

3. The only "person" alleged to have committed a predicate act, namely Heritage, is also the alleged "enterprise" said to have been controlled.

The defendants' other grounds for dismissal need not be considered in view of the foregoing. There is one other ground for dismissal that was not raised by the defendants. Fed.R.Civ.P. 8 requires that a complaint contain a short and plain statement of the claim. The specious polemic filed by the plaintiff in this case does no comply with this rule. I base my dismissal of this action, however, solely on the failure to state a claim under RICO.

The motion to dismiss is allowed, and a judgment of dismissal shall enter forthwith.

Walter Jay Skinner
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 89-1999

MC EVOY TRAVEL BUREAU, INC.
Plaintiff-Appellant

V.

HERITAGE TRAVEL, INC.
DONALD R. SOHN
AND
NORTON COMPANY
Defendants-Appellees

On Appeal From An Order Of The
United States District Court
For The District of Massachusetts

PETITION FOR REHEARING IN BANC

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PETITION FOR REHEARING IN BANC

Because the basis of the panel's opinion of June 1, 1990, overlooks or misapprehends precedents of this circuit (which are in conformity with the relevant decisions of the Supreme Court and the overwhelming weight of other Federal authorities) interpreting what constitutes a violation of the mail and wire fraud statute, 18 U.S.C. §§1341, 1343, the plaintiff-appellant suggests that the case (or at least that issue) be reheard in banc to "maintain uniformity of [this court's] decisions" or, alternatively, that there be a rehearing by the initial panel, all in accordance with the provisions of F.R.A.P. 35 and 40 and Rule 35 of this Court.

The essence of the panel's holding is that there were no RICO "predicate acts" sufficiently alleged because there were no violations of the mail or wire fraud statutes, 18 U.S.C. §§1341, 1343, because "the only parties deceived [and "any scheme...to defraud" "must be intended to deceive another"]--the ATC and IATA--were not deprived of money or property" (Slip opinion [hereinafter, "Op."] ps. 15-21). That transforms what is, truly, a non-issue in this case into the issue, and it is contrary to established law. The opinion displays an impermissibly narrow and incomplete interpretation of what "scheme[s]...to defraud"

are subtended by those statutes. The panel has overlooked and/or misapprehended prior decisions of this court, the Supreme Court, and the overwhelming weight of other Federal court decisions which hold that the allegations of this complaint clearly described violations of the mail and wire fraud statutes--on any one of three valid analyses:

1. it is not the law "that the deceived party must lose some money or property"--the statutes and "*McNally* can be satisfied by establishing the existence of a scheme to deceive one party, thereby depriving another of property" (Emphasis supplied; Op. 21 and n. 13);

2. the second independent clause of the statutes is satisfied: the defendants "obtain[ed] money...by means of false or fraudulent pretenses, [and] representations" (violations totally overlooked in the court's opinion; and

3. McEvoy lost money or a property right as a result of the defendants' "scheme...to defraud."

The opinion cites (Op. 21) only a dictum in *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1989), as support for its holding that the statutes are not violated when one party is defrauded (or "deceived", as the panel, albeit too narrowly,

insists is the essence of "defraud") "thereby depriving another of property." Inferentially, the panel believes that such a dichotomy would not "satisfy" *"McNally."* *McNally v. United States*, 483 U.S. 350 [1987]) (Op. 21, n. 13), the basis for the *Evans* dictum ("as we read *McNally*" "this may be the correct view of the statute [18 U.S.C. §§1341, 1343]"). The *Evans* court recognized, p. 39, that the Supreme Court in *McNally* "did not focus on whether the person deceived also had to lose money or property", but opined that such a "conclusion seems logical." That "conclusion", made a holding of this panel, is, however, not only not "logical" (patently so), it is contrary to the long-established body of authority interpreting the statutes. Start with *McNally* itself--the broad theme throughout the opinion is that the defendant need only to intend (the heart of the crime, of course) that there somehow be a loss of property by someone:

> The mail fraud statute clearly protects property rights....[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.

Durland v. United States, 161 U.S. 306 (1896), the first case in which this Court construed the meaning of the phrase "any scheme or artifice to defraud," held that the phrase is to be interpreted broadly insofar as property rights are concerned....it construed the statute to "includ[e] everything designed to defraud...." "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil...that this statute was passed...."

...the statute's purpose is protecting property rights....

.... "wronging one in his property rights"...frauds involving money or property.

...we read §1341 as limited in scope to the protection of property

rights (107 S.Ct. 2879-2881).[1]

There is a plethora of authority specifically holding that the mail fraud statute is violated even though the party "deceived" is not the "party whose property rights" were harmed (this substantial body of law was, somehow, overlooked by the panel):

United States v. Cosentino, 869 F.2d

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[1]The *Evans* court cited two other "dicta" from *McNally* which, it thought, "may" "indicate" that "the person deceived also had to lose money or property":

> ...any benefit which the Government derives from the statute must be limited to the Government's interests as property holder (107 S.Ct. at 2881 n. 8).
>
> ...the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes" (107 S.Ct. at 2880-81).

The first quote, in context, simply meant that the Government, on the facts of *McNally*, had to show that it had some property interest involved, since no other party conceivably had any. The Court was not in a phrase reversing a century of law (see *infra*), but simply conjoining its holding that "property rights [must be] concerned" in any mail fraud violation. The second quote obviously does not construct the principle that A's loss of property from deceiving B does not violate the statute. In context the implicit emphasis is on the word "property"--that "property rights" must be somehow lost as a result of the defendant's "dishonest methods", although in most cases, of course, the party "deceived" is the party whose "property rights" are harmed.

301 (7th Cir.) *cert. denied*, ___U.S.___, 109 S.Ct. 3220, (1989)--The Illinois Department of Insurance was deceived by the defendants into "permitt[ing] an insurance] agency to remain in business" "allow[ing] the defendants more time" to divert from the insurance agency ostensibly valid commissions to their own use.

United States v. Allard, 864 F.2d 248 (1st Cir. 1989)--The Commonwealth of Massachusetts was defrauded into issuing the defendant a medical license which enabled him to receive a salary from Worcester City Hospital and fees from patients.[2]

United States v. Keane, 852 F.2d 197 (7th Cir. 1988)--The

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[2]This case is fairly characterizable as an example of this first "dichotomy" category--the defendant did not "deceive" either the hospital or the patients, as he was then a "licensed" doctor, although his license was, somehow, obtained by fraud--but it can also be characterized as supporting both the other types of violative "schemes to defraud" (*infra*).

City of Chicago was the "deceived" "victim", while the remote bondholders were the ultimate parties whose "property rights" were harmed, the court observing, p. 205: "a valid conviction [can be had] if the prosecution shows that the defendant defrauded someone out of property"; "the statute does not limit the category of victims"; "much effort was spent at trial trying to figure out who, if anyone, was the poorer as a result of Keane's machinations."

United States v. Piccolo, 835 F.2d 517 (3d Cir. 1987)--The defendant's acts of fraud or deception and the direct "victim" thereof were three steps removed from the party who ended up losing money from the fraud.

United States v. Venneri, 736 F.2d 995 (4th Cir.) *cert. denied*, 469 U.S. 1035 (1984)--A Marriot hotel

employee was bribed by the defendant to award a subcontract to defendant's company, and the court held that there was a sufficient property right lost because defendant's competitors were "defrauded" (here, read McEvoy), unbeknownst to them, however, of their rights fairly to compete for the business.

United States v. Foshee, 606 F. 2d 111 (5th Cir. 1979) *cert. denied*, 444 U.S. 1082 (1980)[3]-- "[N]one of the banks suffered a loss from the check kiting operation" conducted by the defendants-- they obtained loans from other sources "to cover the kited checks", "resulting in losses to [those] various lending institutions" which were totally unaware of the defendants fraud. The court said, p. 113: a "loss was sustained as a result of the scheme. [Citations

[3]Cited on page 30 of McEvoy's brief in chief.

omitted] Fraudulent intent is supported by 'proof that someone was actually victimized by the fraud.' [Emphasis in original]...In mail fraud cases, evidence is not limited to proof of losses to intended victims."

United States v. Castor, 558 F.2d 379 (7th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978)--The defendants fraudulently induced the Indiana Alcoholic Beverage Commission to issue them 12 permits to operate liquor stores. The court held, p. 384, that this "defrauded other persons who applied for permits", although they were unaware of the deception of the Commission, and that "[t]his diminished opportunity to obtain permits reduced the other applicants' chances to make profits", and that this "potential pecuniary injury" to others was a sufficient "loss of money or property" to constitute a violation

of the statute. (Emphasis supplied) (The court's main reliance was on its own previous opinion in a similar case, *United States v. Bush*, 522 F.2d 641 [7th Cir. 1975], *cert. denied*, 424 U.S. 977 [1976], and the *Gregory* case, next, *infra*).

Gregory v. United States, 253 F.2d 104 (5th Cir. 1958)-The defendant postal worker fraudulently won a football contest by back-dating his entry, actually filled out after the games were played, and the court held that there was a violation of the statute because although the contest judge was the one directly deceived, the other contestants were deprived of their rights to maybe win, fairly to compete. The court said, p. 109, that "The thing which is condemned [by §1341] is (1) the forming of the scheme to defraud, however and in whatever forum it may take, and (2) a use of the mails in its

> furtherance....The aspect of the scheme to 'defraud' is measured by nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[4]

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[4]Other cases (and this is not an exhaustive list), technically in accord or in dicta, also support this rule of law that one party can be defrauded and another "undeceived" party deprived of property, but space constraints dictate that they be added here only as a "string cite": *United States v. Maze*, 414 U.S. 395, 402 (1974) (the "scheme" did not depend "in any way on which of his victims ultimately bore the loss"); *Lomelo v. United States*, 891 F.2d 1512, 1518 (11th Cir. 1990) (instructions were defective because "the jury could have found the defendants guilty without finding that they deprived anyone of money or property" [N.B.: actually, even that would not be a defect]); *United States v. Olatunji*, 872 F.2d 1161, 1168 (3d Cir. 1989) (INS deceived, but the DOE lost money, but the "false statements and representations" do not have to be "made directly to the ultimate victim, i.e., the DOE" [Emphasis in original]); *Atlas Pile Driving Co v. DiCon Financial Co.*, 886 F.2d 986, 991 (8th Cir. 1989); *United States v. Egan*, 860 F.2d 904, 909 and n. 2 (9th Cir. 1988) (the *McNally* Court reversed "because the jury had not been charged that it must find some deprivation of money or property" and the *Egan* "jury did not consider whether other individuals [other than the City of Carson] were defrauded or whether Egan defrauded anyone of money or property"); *United States v. Dynaelectric Co.*, 859 F.2d 1559, 1570 (11th Cir. 1988) ("*McNally* and *Carpenter* teach that the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest", where it "would result in depriving another of something of value"); *United States v. Ochs*, 842 F.2d 515, 522 (1st Cir. 1988) (Bownes, J.: "The Supreme Court reversed [in *McNally*], holding in essence that the mail fraud statute was intended to protect property rights but not 'the intangible right of the citizenry to good government'" and "the *Carpenter* Court gave a broad reading to protected property interests"); *United States v. Matt*, 838 F.2d 1356 (5th Cir. 1988) (the conviction would have clearly also been affirmed had the bonding company reimbursed the "deceived" Brown & Williamson all the $390,000 it lost, rather than only $260,000); *United States v. Rendini*, 738 F.2d 530, 533 (1st Cir. 1984) ("Accordingly, the mail fraud statute was enacted by Congress to protect the

A question raised by the opinion in footnote 5, p. 10, should also here be answered (lest the court upon rehearing accept that there were violations of the mail fraud statute, but of insufficient number and "continuity" to make out a RICO "pattern." Hundreds of subsequent mailings to ATC-IATA over the years since 1983 were necessary to maintain the initial deception that the Norton-Heritage "in-plant" operation was legal. The record specifies the ATC-IATA regulations--including weekly reports--which validate McEvoy's argument that there had to be an on-going defrauding of ATC-IATA (A. 105-108; 112-116; 124). The complaint alleges that too, albeit generally (A. 9, ¶22), and incorporates the fraudulent "in-plant" contract which also specifies the on-going need to comply with the ATC-IATA regulations (and continue, of course, to deceive them: that no illegal rebates were, of course, being regularly paid) (A. 10, ¶22; 30-36, particularly ¶¶5 and 6). These hundreds of subsequent fraudulent mailings, like the thousands of illegal rebate mailings, cannot be specified by dates, etc. until

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Footnote 4 continued
integrity of the mails by making it a crime to use them to implement fraudulent schemes of any kind" [Emphasis supplied].); *United States v. Foshee*, 569 F.2d 401, 402 (5th Cir. 1978) (""But the interesting twist in this [check kiting] case is that none of the six banks lost any money on this alleged scheme.")

discovery is had. All those fraudulent mailings are quite real, and must here be accepted as factually alleged. Defendants' materials expanding the record do not controvert them, but since the complaint focussed on the "in-plant" "rebate" mailings to establish the predicate acts, if the ATC-IATA subsequent fraudulent mailings were to now become dispositive, and if the court considers that the complaint allegations should be more specific in that regard, upon remand that expansion can easily be accomplished. As McEvoy is now entitled to every fair inference (Op. 2), however, this cannot be made a substantive defect.

Since the correct rule of mail fraud law (as above set out) permits the "property interest" harmed to be a correlative party's interest, another subsidiary erroneous dictum in the opinion must also be corrected. The panel says, in footnote 11, ps. 18-19, that "it could be argued that [McEvoy] has not been deprived of a money or property interest within the meaning of *McNally*" because the state court trial judge granted the N.O.V. motion on the oral contract count "under the statute of frauds", and since that "issue...was fully litigated", "collateral estoppel" makes McEvoy's lack of "an enforceable contractual right...binding

here." Even if McEvoy's "contractual right" were now, technically, "unenforceable under the statute of frauds", that cannot possibly foreclose McEvoy from proving here, as is alleged, that its "property interests" were harmed--that "the only reason" that it lost the Norton business was "solely because of [the defendants'] illegal contract" (Op. 7). There is no authority for the proposition that McEvoy's inability to recover in a contract action bars proof that its "property interests" were harmed for mail fraud "predicate act" RICO purposes. McEvoy's Reply brief (ps. 4-13) details that the law is otherwise. The complaint specifically alleges McEvoy's damages and their having been caused by the acts of the defendants for RICO purposes, and the court must, of course, accept those facts as true. [5] Further, the "statute of frauds" issue, even if it were determinative here of McEvoy's loss of

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[5]It should, perhaps, be noted that on page 20 the opinion appears to determine, impermissibly, the fact of "causal connection", contrary to McEvoy's allegations and the opinion's previous recognitions (see, particularly, page 7) that the complaint allegations make the "causal connection." Only by fraudulently securing and maintaining ATC-IATA approval of the (illegal) "in-plant" operation could the defendants operate it, and that empowerment was the source of the illegal rebates, which payments to Norton, as is alleged, were "the only reason" McEvoy lost its valuable Norton business. The "causal connection" even "in the ordinary sense" (Op. 20), could not be clearer--even if McEvoy had no legally "enforceable contractual right."

"property interests", has not been "fully litigated" on the particular facts of this case to constitute a "collateral estoppel" bar. The court's own cited authority (Op. n. 11, p. 19), *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 479 N.E. 2d 1386 (1985), and the other authorities cited therein, make that clear, both as to Norton, a party to the state action, but, most particularly, to Heritage and Sohn, who "were not parties." *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 476 N.E. 2d 595 (1985) (cited in *Fireside*). The "statute of frauds" N.O.V. was not "essential to the ["final"] judgment the Massachusetts Supreme Judicial Court will render on the pending appeals, there was no "full and fair opportunity to litigate the issue", and "equitable considerations" otherwise "warrant" "relitigation" (if such even be thought to be needed).[6] It would have been pointless--nay, "frivolous"--for McEvoy to have cross-appealed the $35,000 contract N.O.V. (erroneous as it was), when McEvoy had won a $600,000, plus interest and

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[6]Somehow, the jury determined that McEvoy's damages on the oral contract count were only $35,000, versus $465,000 on the deceit count and the $600,000 (after remittitur) on the c. 93A count (A. 83-85). It happens that Judge Mulkern's N.O.V. decision does not specify the amount of the contract count damages (A. 78-82), but the court could judicially notice that amount in the state court verdict, and a copy thereof (page 72 in Norton's Appendix in its state court appeal) is attached hereto, by way of supplement to this record.

attorney's fees, 93A judgment and a $300,000 (after remittitur), plus interest, deceit judgment! For a factually apposite application of the Massachusetts-Restatement "collateral estoppel" rule, in the guise of a Federal rule, see *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 538-541 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

The second type of conduct violative of the mail and wire fraud statutes was totally overlooked by the panel--the second clause of 18 U.S.C. §§1341, 1343, that the defendants here "obtain[ed] money...by means of false or fraudulent pretenses, [and] representations." The complaint, unquestionably, alleges that violation throughout, that the fraudulently constructed "in-plant" operation was the mechanism by which Norton was paid the illegal rebates, Heritage/Sohn received commissions and associated "kickback", etc. Granted, the defendants never raised this issue, and Judge Skinner's opinion accepts the mail and wire fraud predicates, and McEvoy's brief concentration was on the other two theories of mail fraud. This mail and wire fraud focus is, unexpectedly, the panel's (the defendants address it only in passing on a total of three pages of the 90 pages of defendants' briefs). McEvoy's validating response to the

court's surprising analysis cannot fairly be foreclosed, however. (Several of the cases cited in McEvoy's briefs recognize this theory of mail and wire fraud violation--*McNally* itself does [107 S.Ct. at 2882].) Besides the *McNally* recognition of this type of (second clause) violation of 18 U.S.C. §§1341, 1343, the Federal courts have uniformly always recognized it--with a particular focus on this court's own opinions, see, for instances: *United States v. Doherty*, 867 F.2d 47, 56 (1st Cir.), *cert. denied*, ___U.S.___, 109 S.Ct. 3243 (1989) (the police officers fraudulently "obtained" "the money used to pay the salaries of those improperly promoted"); *United States v. Allard*, 864 F.2d 248 (1st Cir. 1989) (the court implicitly seems to find the defendant's receipt of "monetary compensation", "remuneration", the key to the fraudulent scheme); *United States v. Wellman*, 830 F.2d 1453, 1463 (7th Cir. 1987) ("The charge to the jury permitted conviction if it found either a 'scheme to defraud' or that Wellman obtained money through 'false pretenses, representations and promises"); *United States v. Rendini*, 738 F.2d 530 (1st Cir. 1984); *United States v. Ianniello*, 677 F.Supp. 233 (S.D. N.Y. 1988); *United States v. Weinberg*, 656 F.Supp. 1020 (E.D. N. Y. 1987). The fact that

this second type of mail fraud violation is here presented cannot be gainsaid. That validates the necessary "predicate acts" and should not be overlooked or ignored by the court.

The third analysis of mail and wire fraud violations will not here be belabored, the thousands of effectuations of the illegal rebates. That was the focus of McEvoy's briefs, and the opinion disposes of that theory, apparently, because it narrows "scheme to defraud" to "deceive" and finds that McEvoy was not "deceived" (Op. 16) and there was no "causal connection" (Op. 20) That latter point was addressed above, and McEvoy submits, per many of the above-cited authorities, that "deceive" is an impermissible narrowing of the "schemes to defraud" which violate the statutes. The fraudulently constructed "in-plant" operation and the fraudulent payments to Norton of the illegal rebates had as its purpose, not just the effect, to displace McEvoy, take its valuable business profits. The panel, somehow, could not see that ("to induce McEvoy to give up its position" [Op. 16], frankly, dissembles); was not justly outraged. Hopefully, in banc, the full court will see that a valid RICO action is alleged and that McEvoy is entitled to a trial.

Because this issue has not really been briefed at all--is essentially the panel's constructed focus[7]--McEvoy entreats the court to at the very least order supplementary briefing and argument. The issue is too important to be determined like this. The panel has constructed an aberrational interpretation of what it takes to violate the mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, which will undoubtedly, sire substantial future difficulties, should it be let abide--in this circuit and all the others. Many mail or wire fraud criminal defendants would be provided a shield against conviction which they would otherwise not have, and many other RICO plaintiffs would have their otherwise valid actions undercut. Both such cases regularly recur. This proliferation of mischief and injustice should be avoided--beyond the compelling need to treat McEvoy fairly in this case. Fairness, *stare decisis*, and "uniformity" conjoin to

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[7]The opinion's only cited support for its erroneous holding on the first point, "that the deceived party must lose some money or property", was the *Evans* dictum (Op. 21), as noted, but, unaided by advocacy, the court overlooked an even better supporting authority, *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989). The case is clearly erroneous, as the citations above demonstrate, but this matter is too important to be determined in this manner, without full briefing.

mandate in banc review or, at the very least, a comprehensive rehearing by the panel.

Respectfully submitted,

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DATED: June 15, 1990

STATUTES

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both.

§1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 20 years or both.

§1961 Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery, sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions) section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud) section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matters), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1954 (relating to unlawful welfare fund payments) section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle

parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;